IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 53 OF 1997

Siridao Estate Pvt. Ltd.,
A registered company
having its office at
Dempo House, Afondo de
Albuquerque Road,
Panaji, Goa and represented
by its Director Shrti Laxmi
Narayan V. Dempo,
R/o Panaji, Goa. ... Appellant/Original Plaintiff.

versus

Smt. Sita Rama Kankonkar
R/o Palem-Siridao, Ilhas-Goa
Legal Representative of
deceased Yeshwant Rama
Kankonkar, at present represented
by her Attorney Shri Dilip Rama
Kankonkar, R/o Palem, Siridao,
Ilhas, Goa. ... Respondent/Original Defendant.

Mr. S. M. S. Usgaonkar, Advocate for the Appellant.

Respondent exparte.

CORAM : N. A. BRITTO, J.

DATE : 2ND SEPTEMBER,2005.

ORAL JUDGMENT

This is plaintiff's second appeal arising from R.C.S. No.58/88/B.

2. There is no dispute that the plaintiff is the owner of the property known as "Palem" surveyed under No. 56 of Siridao village and "bhatkar" of the respondent in respect of a structure identified in the survey records under No.34 and bearing House No.436 of the Village Panchayat. The said house was recorded in the Record of Rights in the name of Rama Vithal Kankonkar, the father of the defendant.

3. The plaintiff filed a suit against the defendant with an allegation that about two weeks prior to 29-2-1988, the defendant constructed a new house admeasuring 48 sq. meters at a distance of about 10 meters or so from house no.77 belonging to one Yeshwant Bicu Kankonkar. It was also the case of the plaintiff, brought about by subsequent amendment, that somewhere in May, 1971 the defendant extended the said newly constructed structure thereby encroaching a total area of

45.85 sq. meters. It was the case of the plaintiff that the area prior to the said construction of the said structure by the defendant, was an open and vacant land. The plaintiff, therefore, filed a suit against the defendant, interalia, with a prayer for the removal of the encroachment done by the defendant and to restore the same to its original condition.

4. The case of the defendant was that the suit house was in existence since about 15 years and the same was constructed by the father of the defendant with the permission and consent of the Dempo family and also residing lawfully in it and since the late father of the defendant resided in the suit house lawfully and with the consent of the Dempo family, he resided as a mundkar of the Dempo family and since the suit house became in dilapidated condition and required urgent repairs, therefore, the defendant made repairs to the suit house and renovated the same. The defendant stated that the old house had a plinth of 48 meters and even after the renovation it had the same area.

5. The learned Civil Judge, Junior Division framed 4 issues. Issue No.2 was "whether the plaintiff proved that in February,1988 the defendant trespassed in the open land and erected a new house of 48 sq. meters".

Issue No.3 was whether the defendant proved that the said house was constructed in the year 1973. The learned Civil Judge answered Issue No.2 in the affirmative while issue No.3 was answered in the negative and thereafter the learned Civil Judge proceeded to partly decree the suit of the plaintiff directing the defendant to remove the encroachments done in the suit area and to restore the same to its original condition.

6. The defendant preferred an Appeal being R.C.S. No.10/96. The learned appellate Court took the view that the learned Civil Judge, Junior Division had lost sight of the defence taken by the defendant in the written statement and further stated that the defendant had clearly stated that the suit house was in existence since about 15 years. The learned appellate Court felt that an issue of mundkarship was relevant to decide the controversy between the two parties but such an issue was not framed and consequently the defendant was deprived of proving the same. Therefore, the learned first appellate Court directed the learned Civil Judge, Junior Division to frame an issue of mundkarship and send the same to the Mamlatdar for the termination.

7. By Order of this Court dated 23-1-1998, 3 substantial questions of law were framed. In my view, an answer to question no.1 alone would

be more than sufficient to decide the controversy between the parties.

8. As already stated, the defendant was a mundkar of the plaintiff-bhatkar in respect of house identified under survey no.34 having Village Panchayat No.436. The defendant had admitted that the new house was constructed by her with the consent of the Dempo family without specifying as who exactly from the said family had given her consent and not only that the defendant had also admitted that the said house was constructed 15 years prior to 11-11-1988. Section 2(p) of the Goa, Daman and Diu Mundkars(Protection from Eviction) Act, 1975 defines the expression "mundkar" to mean a person who with the consent of the bhatkar or the person acting or purporting to act on behalf of the bhatkar lawfully resides with a fixed habitation in a dwelling house with or without obligation to render any services to the bhatkar and includes a member of his family but does not include -

(i) a person paying rent to the bhatkar for the occupation of the house;

(ii) a domestic servant or a chowkidar who is paid wages and who resides in an out-house, house-compound or other portion of his employer's residence;

(iii) a person employed in a mill, factory, mine, work-shop or a commercial establishment and is residing in the premises belonging to the owner or

person in charge of such mill, factory, mine, workshop or commercial establishment, in connection with his employment in such mill, factory, mine, workshop or commercial establishment; and

(iv) a person residing in the whole or part of a house belonging to another person or in an out-house existing in the compound of the house, as a care-taker of the said house or for purposes of maintaining it in habitable condition.

Explanation.-- A person shall be deemed to be lawfully residing with the consent of the bhatkar in a dwelling house if such person resides in it for a period exceeding one year prior to the appointed date and the bhatkar has not initiated any proceedings, during the said period of one year, to evict such person from the dwelling house, through a competent court of law, on the ground that such person was a trespasser or, having so initiated such proceedings does not succeed in obtaining a decree for the eviction of such person.

9. Admittedly, the defendant was occupying or residing with a fixed habitation in her dwelling house having Village Panchayat House No. 436 and, therefore, the defendant could not have another house in the same property as her dwelling house, as defined in Clause (i)(a) of Section 2 of the Act. If the defendant was a mundkar in relation to the said house bearing Village Panchayat No.436 then certainly there was no necessity of

referring the plea taken by her in relation to the new house to the Mamlatdar for his decision for the defendant by no stretch of imagination could have been a mundkar in respect of two different houses belonging to the bhatkar situated in the same property and close by. In this view of the matter, there was absolutely no necessity for the learned appellate Court to have directed the learned Civil Judge, Junior Division to frame an issue and refer the same to the Mamlatdar for his decision. The suit filed by the plaintiff irrespective of the said reference could have been decreed only in case the plaintiff had succeeded in proving the plaintiff's allegation that this new structure was constructed by the defendant in January, 1988.

10. The defendant had not pleaded that she was residing with a fixed habitation with the consent of the bhatkar in the said new house constructed by her/her father and in this view of the matter also there was no necessity of referring a vague plea to the Mamlatdar for his decision.

11. On this aspect. Mr. S. M. S. Usgaonkar, the learned Counsel of the plaintiff has placed reliance on the case of **Zuari Real Estate Company Private LImited** v. **Shri Thomas Souza**(2002 (2) GLT 78) wherein an issue was framed whether the defendant no.2 proved that he was a mundkar of the suit house and inspite of the fact that the said issue was

framed, this Court held that the contesting defendant had not pleaded that he was occupying the structure as a dwelling house and that he had not even stated as to which part of his property was under his occupation for his dwelling house and, therefore, it was difficult to accept that any plea of mundkarship of the contesting respondent was required to be decided, based on the pleadings, and facts and circumstances of the case on record. The Court held that the plaintiff had come out with a case that the structure had been erected for the first time in June, 1986 and, therefore, it was clear that if the plaintiff proved his case as pleaded in the plaint, then the question as to the contesting respondent was a mundkar or not did not arise. The ratio of this decision is equally applicable to the facts of the case at hand.

12. In the case of **Mitra of Archdiocese of Goa and Daman** v. **Mr. K. Vijayadharan**(1999 (2) GLT 97) this Court held that in the absence of disclosure of all the ingredients of the definition of "mundkar" it cannot be said that the party had raised a plea of mundkar and, therefore, there could not be an issue of mundkar. The Court also referred to another decision of this Court, though on the issue of tenancy, in the case of **Pandu Dhondi Yerudkar and another** v. **Ananda Krishna Patil**(AIR 1975 Bombay 52) and noted that "when a vague plea is made by the defendant contending that he

is a tenant of the land, the Court should hesitate to frame such an issue on such a vague plea, unless the defendant is able to give particulars showing the time when the tenancy was created, the person by whom it was created and the terms on which it was created. I have already noted that the consent having come from the Dempo family, as pleaded by the defendant is rather too vague to prove any consent. The cases of **Zuari Real Estate Company Private Limited** v. **Shri Thomas Souza**(supra) and the case of **Mitra of Archdiocese of Goa and Daman** v. **Mr. K. Vijayadharan**(supra) were again followed by this Court in the case of **M/s. Siridao Estates Pvt. Ltd.** v. **Smt. Apolona Pires**(2002(2) GLT 81) and an issue which was framed on vague pleadings was struck out.

13. For the reasons set out hereinabove, in my view, considering the plea taken by the defendant, the learned Additional District Judge in R.C.S. No.10/96 was certainly not justified in directing the learned Civil Judge, Junior DIvision to frame an issue of mundkarship and refer the same to the Mamlatdar. The first substantial question, therefore, has got to be answered in the negative.

14. As a result, the findings of the learned Additional District Judge in R.C.S. No. 10 of 96 are required to be disturbed and those of the learned

Civil Judge, Junior Division in R.C.S. 58/88/B are required to be upheld and confirmed. This Appeal is, therefore, allowed on the above terms with costs.

N. A. BRITTO, J.

RD.